on the second ground, that the creditor is bound to assign all separate securities to the cautioner, not *ex equitate* only, but *de jure*, and that, if he have aliened such securities to a third party, he cannot thereafter be heard to quarrel the validity of such securities which he himself has conveyed."

1739. *July* 6. JOHN CORSBIE *against* JAMES SHIELL.

For the facts of this case, *vide* C. Home's Report, (*C. Home*, p. 200; *Mor.* p. 16842.) Lord Kilkerran's note is as follows :—

" It was suggested by Elchies, upon moving the bill, that in this case there was no writ at all necessary; for a verbal agreement would have had the same effect. But if it is put upon this, the oath does not prove accession to this agreement. It proves no more but that he agreed the lands should be sold to be applied to payment of his debt, but proves no accession to any agreement for quitting any of the subject of his payment."

" July 4, 1739. At advising the petition and answers, it was observed by the Ordinary, that the question did not occur here, whether one's presence at a meeting of creditors, and not opposing the general measures, implied an acquiescence, because the party was not agreed that there was any such meeting; the charger affirming that he was called off the street to sign, as others were, one after another, and that there was no general meeting. He further observed, that he laid no weight upon the quality of the charger's oath; but that he had put his interlocutor upon the abstract point, that a deed null for want of solemnities required by law, could not be supplied, so as to induce the *literarum obligatio*, by the party's oath, though the oath might prove the debt.

" ELCHIES observed, that deeds labouring under such defects had been found capable of homologation, and therefore might be supplied by oath.

" ARNISTON observed, that that argument would carry the matter too far, if these precedents were to be the rule; for he believed it may have been found, that where a man's subscription was not legally attested by witnesses, homologation might supply the deed, but declared he was not of the opinion of those decisions; but he thought in the case, where it was not of a party's subscription not legally attested, the deed might be homologated, and therefore was in this case suppliable by the party's oath, that he gave warrant to one notar to sign, for that the two notars are only required, *ad majorem evidentiam*, of the party's consent, and not in way of solemnity.

" Upon the vote, the Lords were equally divided, and by the President's casting vote it carried to alter and sustain the deed. Having talked of this matter afterwards with ARNISTON, I found him of opinion, that before the year 1681, even when a party's subscription was not legally attested, the defect might have been supplied by the party's oath, that he signed the deed, but that the same was not suppliable by the party's oath since the act 1681. Now, the signing by notars being no part of the act 1681, he considered all defects in such deeds to be suppliable.

"*N. B.* I have often observed the President favour the opinion, that, in general, where a nullity is objected to a writ, the writ might be supported by the party's oath; but in that I always differed from him, and I dare say it was upon that general ground that he gave his casting vote in this case; for that distinction of its being a notar's subscription was not so fully opened by ARNISTON, who moved it, as it is here noted, as to have been adverted to: it was a small case, and the reasoning very short."

1739. *July* 20. ANNABEL EWING, relict of PATRICK GLEN, *against* JOHN SEMPLE.

THE defender's father became bound, as cautioner, along with William Ferrier, as principal debtor, in a bond, dated 16th May, 1732, to the said Patrick Glen, the husband of the pursuer. After the death of the defender's father, and of Patrick Glen, the pursuer, as having right to the bond, by a general disposition from her husband, raised an action upon the passive titles, against the defender, as representing his father, for payment of the sum in the bond.

In defence, it was PLEADED, 1*mo*, That Glen, the creditor in the bond, having been a bastard, the pursuer had no sufficient title to insist for payment, she having no particular right to the bond, but only a general disposition, which could avail no more than a testament would have done. 2*do*, That the bond was null, in respect that the writer was not designed before inserting of the witnesses; and that, though it were not necessary for the writer of a deed to be designed before inserting of the witnesses, it is at least necessary that he should be someway or other certainly described, which he is not in this case, the bond only bearing in the end of it to be subscribed before these witnesses, John Buchanan, maltman in Dumbarton, *and Adam Colquhoun, servitor to James Duncanson, writer hereof*, which leaves it uncertain whether Adam Colquhoun or James Duncanson was the writer.

3*tio*, That the defender was free of the cautionary obligation, under the Act 1695, there having been no diligence done on the bond within seven years from the date.

It was ANSWERED for the pursuer, that her title not being revocable, was not of a testamentary nature, but was a deed *inter vivos*: that the Act of Parliament requiring the designing of the writer, before inserting of the witnesses, was in desuetude; and that it was plain here that Colquhoun, one of the witnesses, was the writer; and, *lastly*, that the septennial prescription had been sufficiently interrupted by the present summons, raised within the seven years.

The Lord Ordinary repelled the defences.

A reclaiming petition was presented by the defender, containing an argument on each of the above points. The argument upon the two first defences may be seen in C. Home's report of the case, (*C. Home*, p. 213, *Mor.* p. 1352.) to which reference is therefore made. Upon the third defence of prescription, it was maintained, that nothing except what comes under the name of *legal diligence*, can in-